

**[Advisory Opinion 1994-10]**

July 12, 1994

[Name1 withheld]

RE: Request for Waiver

Dear [Name1 withheld]:

You have requested that the Ethics Commission grant you a waiver from §407 of the Montgomery County Charter to permit you to receive compensation for your service as a member of the Montgomery County Fire and Rescue Commission (FRC) in addition to your compensation as a Fire/Rescue Captain of the Montgomery County Department of Fire and Rescue Services (DFRS).

For the following reasons, the Ethics Commission has determined that no waiver is required.

Relevant Charter and Code Provisions

The Montgomery County Charter states:

No member of the Council and no officer or employee of the County whose salary is fixed, in whole or in part, by this Charter, the laws of the County, or its personnel regulations, shall be entitled, directly or indirectly, to any other salary, expenses, or compensation from the County for performance of public duties except expenses for travel and subsistence incident to the performance of official duties as prescribed by law.

§407 of the Montgomery County Charter. In addition, the Charter provides that:

No person whose compensation is paid in whole or in part by the County shall (1) act as an attorney, agent, broker, or employee for, or receive compensation or anything of value from any person, firm or corporation transacting business of any kind with, or engaging in litigation against the County, or any instrumentality thereof; (2) represent or serve any client in any manner if that client's interest is adverse to that of the County, or in conflict with the person's official duties. The Council shall prescribe by law standards and procedures for the implementation of this Section and for justified waivers from the provisions of this Section when such waivers are deemed to be in the best interest of the County after full public disclosure of all pertinent facts. The Council shall also prescribe by law penalties for violation of this Section.

§411 of the Montgomery County Charter.

For purposes of considering your request for a waiver, these provisions must be read in conjunction with the Montgomery County Code. The relevant sections of the Montgomery County Code state:

[T]he Commission may grant to a public employee or a class of public employees a waiver of the prohibitions of . . . Section 411 of the Charter . . . if it finds that:

- (1) the best interests of the County would be served by granting the waiver;
- (2) the importance to the County of a public employee performing his or her official duties outweighs the actual or potential harm of any conflict of interest; and
- (3) granting the waiver will not give a public employee an unfair advantage over other members of the public.

§19A-8(a) of the Montgomery County Code 1984, as amended. The Ethics Law further provides:

[U]nless permitted by a waiver, a public employee must not participate in:

- (1) any matter that affects, in a manner distinct from its effect on the public generally, any:
  - (A) property in which the public employee holds an economic interest;
  - (B) business in which the public employee has an economic interest; or
  - (C) property or business in which a relative has an economic interest, if the public employee knows about the relative's interest . . . . [§19A-11(a)(1)]

\* \* \*

[P]aragraph (a)(1) does not apply to a public employee who is appointed to a regulatory or licensing body under a statutory provision that persons subject to the jurisdiction of the body may be represented in appointments to the body. [§19A-11(b)(3)]

§§19A-11(a)(1) and (b)(3), respectively, of the Montgomery County Code 1984, as amended.

The following provisions regarding the FRC are pertinent to the issues presented by your waiver request:

- (a) Established; membership. There is hereby established a county fire and rescue commission to be composed of seven (7) members appointed by

the county executive and confirmed by the county council. The members should come from various geographical areas of the county and have a variety of occupational backgrounds . . . At least one (1) member from a list of a minimum of ten (10) career, nonvolunteer firefighters submitted by organizations composed of career fire or rescue personnel should be considered for appointment . . . .

- (d) Compensation. Compensation for commission members shall be established by the county council in the budget. A commission member who is a career employee of a corporation shall be entitled to compensation as a commissioner once a waiver is obtained from the ethics commission relieving the commission member from the provisions of section 411 of the county charter . . . .

§21-4B of the Montgomery County Code 1984, as amended.

### Analysis

A review of these provisions in the context of recent legislation and a prior interpretation of §21-4B of the Montgomery County Code by the Ethics Commission suggests that no waiver of the Charter or of the Montgomery County Code is required.

Section 407. The language of §407 of the Charter emphasizes the receipt of additional compensation for the same duties. Although no details were provided explaining your specific duties as an employee of DFRS and the anticipated duties as a Commissioner of the FRC, it is assumed for purposes of this decision that the two assignments involve separate and distinct responsibilities. The Ethics Commission further assumes that you perform your FRC duties after your normal DFRS working hours or during a period of approved leave. As long as the respective assignments entail separate duties and responsibilities, the prohibition of §407 of the Montgomery County Charter does not apply. Rather, you will be receiving additional compensation for additional duties, not the same duties. In the event that the duties you perform in the two positions begin to coincide or become indistinguishable, a reevaluation of this conclusion may be required.

At this juncture, based upon the information provided to the Ethics Commission, it is the determination of the Ethics Commission that §407 of the Charter does not apply to your appointment to the FRC.

Section 411. The interpretation of the reference to §411 of the Montgomery County Charter in §21-4B of the Montgomery County Code involves a more complex analysis. The language of §21-4B requiring a waiver of §411 of the Charter was enacted prior to 1987 and applied during a time when the fire corporations employed firefighters independently of the Montgomery County employees. In 1987, however, the Montgomery County Council enacted Bill 42-87, which permitted the corporation firefighters to transfer to County employment with DFRS. Inasmuch as you hold a position as a career firefighter employed by Montgomery County, the terms of §21-4B do

not apply to your appointment to the FRC and, therefore, no waiver of §411 of the Montgomery County Charter is needed.

Conflict of Interest. Ordinarily, the appointment of a firefighter, who is regulated by the FRC, to serve as a commissioner of the FRC would create a conflict of interest. §19A-11(a)(1) of the Montgomery County Code 1984, as amended. In this particular situation, however, the statute that establishes the FRC specifies that at least one member will be a career, nonvolunteer firefighter. §21-4B of the Montgomery County Code. As a result, your appointment is within the exemption from the conflict of interest provision that appears in §19A-11(b)(3) of the Montgomery County Code.

For these reasons, it appears that no waiver is required for you to serve on the FRC and receive compensation pursuant to your recent appointment. If you have any questions concerning this decision, please contact the Ethics Commission.

Sincerely,  
[signed]  
Jay L. Cohen, Chair  
Montgomery County Ethics Commission

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cc: Barbara McNally, Administrative Specialist